APPEALS PANEL NO. 94013
FILED FEBRUARY 11, 1994

This appeal is considered in accordance with the Texas Workers' Compensation Act (1989 Act), TEX. LAB. CODE ANN. §401.001 *et seq.* (formerly V.A.C.S., Article 8308-1.01 *et seq.*). On October 18, 1993, a contested case hearing was held in (City), Texas, with _____ presiding. The issues to be determined were whether the (Claimant), who is the appellant, notified his employer, (employer) about his (date of injury), within 30 days, and whether he sustained disability, i.e., the inability to obtain and retain employment equivalent to his pre-injury wage, as a result of his injury.

The hearing officer determined that the claimant had not timely reported the alleged injury to his employer, and did not have good cause for the failure to report it. He further determined that the claimant sustained no disability as the result of a compensable injury. The carrier was discharged from liability for the claim due to the failure of claimant to give timely notice.

The claimant has appealed the decision. He argues both that he gave notice to his supervisor on the day of the injury, that the notice given was adequate and that the supervisor had actual notice of injury. The claimant also essentially argues that he did not appreciate the seriousness of the injury until February 23, 1993. The carrier responds that the evidence was inconsistent with regard to when claimant realized he was injured, argues other evidence in favor of the hearing officer's decision, and asks that it be affirmed.

DECISION

We affirm the hearing officer's decision.

The statement of evidence in the hearing officer's decision fairly summarizes the evidence, and will be recited here with some additional facts. Claimant, employed as a pipefitter, testified that as he moved a heavy section of pipe with his foreman and another worker, he felt a pop in his back and sharp pain. He said that he commented to his supervisor, (Mr. B), either "I think I hurt my back" or that he had just popped his back, to which Mr. B replied, "[a]re you hurt?" Claimant stated he replied, "No, I don't think so." Claimant said that he responded this way to Mr. B's question because he didn't think it was that severe, and he didn't want to risk being taken off work.

In a deposition taken November 11, 1993, Mr. B stated that he could only vaguely recall that on an unknown date, the claimant said he had popped something. He only recalled this after claimant contacted him shortly before the deposition and discussed the incident. Mr. B felt that if he understood that claimant had injuries, he would have sent him to the medic.

Claimant stated that he knew at the time he was injured, but as the job was well-paying and he wanted to earn money, he did not complain lest he be taken off work. Thus,

he continued to work. Claimant said his back would hurt and be stiff in the morning, but as he worked would not be too much of a problem. He said that within a few weeks his foot started hurting, and this became the greater problem to him.

Ultimately, claimant went to (Dr. H) about his foot, but Dr. H said he did not treat such a problem and, without examining him, referred him to (Dr. S), who told him on or about (date), that he suspected a ruptured disc and recommended an MRI. Claimant had the MRI done on August 31, 1992. He stated that Dr. S called him at work to tell him the MRI showed a herniated disc, but that claimant disbelieved the doctor, because he did not see how his foot pain was caused by his back.

The claimant asked his wife to find another doctor for his foot. He thereafter saw (Dr. B), a neurologist. According to Dr. B's January 26, 1993, report, he told claimant that he had mild radiculopathy on his left side (as well as the herniated disc), and advised him to look for non-physical work. Claimant maintained that he still did not believe that his foot pain would be caused by his back. He further admitted he did not tell either Dr. S or Dr. B about the (date of injury) "popping" incident, even after he was advised of his ruptured disc.

Claimant was laid off in a reduction in force on February 19, 1993; his testimony indicated that he knew that the job he was working on would eventually end, which is why he kept working to earn as much as he could. Claimant went to (Dr. A), who convinced him finally of the relationship between his back and foot. He said that Dr. A was the first doctor he told about his work-related incident. Claimant filed a formal claim with the Texas Workers' Compensation Commission on March 8, 1993.

Section 409.001 requires that the injured employee give notice of an injury to a person in a supervisory or management capacity within 30 days. Mr. B would qualify as such a person for the employer in this case. However, the notice given, while it need not be fully detailed, should at a minimum apprise the employer of the fact of an injury and the general area of the body affected. Texas Employers' Insurance Ass'n v. Mathes, 771 S.W.2d 225 (Tex. App.-El Paso 1989, writ denied). In this case, the claimant specifically disclaimed injury to his supervisor, and there is sufficient evidence upon which the hearing officer could conclude that notice of injury was not given.

Belief that an injury is trivial can constitute good cause for failure to give timely notice. Farmland Mutual Insurance Co. v. Alvarez, 803 S.W.2d 841 (Tex. App.- Corpus Christi 1991, no writ). The belief an injury is not serious must be reasonably prudent under the circumstances in order to constitute good cause. Texas Employers Insurance Ass'n v. Daniels, 257 S.W.2d 150, 153 (Tex. Civ. App.-Dallas 1953, no writ). Good cause must continue up to the time that notice was actually given. Alvarez at 843. While there may arguably have been good cause from the injury until the date claimant first consulted with Dr. S, the fact that claimant subjectively refused to believe that his foot pain was related to his back and thus to the incident at work was apparently determined by the hearing officer to no longer constitute good cause that would support the passage of time from his diagnosis until he actually filed a claim.

The need for notice can be dispensed with where there is actual knowledge of an injury. DeAnda v. Home Insurance Co., 618 S.W.2d 529, 532 (Tex. 1980). Actual knowledge of Mr. B of the injury (notwithstanding claimant's denial of injury) could be found if the trier of fact believed that the employer had facts that would lead a reasonable person to conclude that a compensable injury had been sustained by the claimant in an accident which the supervisor witnessed. *See* Miller v. Texas Employers' Insurance Ass'n, 488 S.W.2d 489 (Tex. Civ. App.- Beaumont 1972, writ ref'd n.r.e.). In the Miller case, the court noted that a question of actual knowledge was presented where a five foot fall from a truck bed was witnessed, that the employee fell on his back, and that he thereafter began to slow down in performance of his work in the 30 day period thereafter. In the case at hand, the strong evidence was that claimant continued to work and there was no evidence that he slowed down. The case is therefore closer to the situation in Fairchild v. Insurance Company of North America, 610 S.W.2d 217 (Tex. Civ. App.- Houston [1st Dist.] 1980, no writ), where the court determined that timely notice was not given and there was no actual knowledge of injury although supervisors were there when the employee fell. In that case, as here, the employee asserted that he was fine and did not slow down after his injury. We also note that although Dr. S called claimant at work to report the results of his MRI, there was no indication that claimant in turn notified his employers of this diagnosis. *See also* Texas Workers' Compensation Commission Appeal No. 931006, decided December 17, 1993.

Although claimant complains that the hearing officer's decision appears to cast discredit on claimant for contacting Mr. B about the incident and refreshing his recollection about it, we do not read the decision in the same way. It does not appear to us that the hearing officer gave less weight to Mr. B's statement because of any opinion that claimant acted improperly, as much as because Mr. B's recollection was vague. Further, it was claimant, and not Mr. B, who testified that he told Mr. B he was not hurt. While we would agree with claimant that such an injury as he sustained can indeed manifest at a later time, this would be more relevant to claimant's good cause argument, discussed above.

A compensable injury, according to the 1989 Act, is not only one which occurs in the course and scope of employment but one for which compensation is payable. Section 401.011(10). The carrier in this case was relieved from liability for payment of benefits due to lack of timely notice or applicability of any other exceptions to notice. Section 409.002. Because the definition of disability depends upon finding a compensable injury as the source of the inability to obtain and retain employment equivalent to the pre-injury wage, Section 401.011(16), the hearing officer determined that there was no disability as defined in the Act. This does not mean that claimant is without a physical condition; rather, it is a conclusion of law depending solely upon the unique definition of disability under the 1989 Act.

We affirm the decision and order of the hearing officer on both issues.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Philip F. O'Neill
Appeals Judge